In the High Court of Judicature at Madras

Dated : 04.09.2007

Coram :

The Honourable Mr.Justice K.RAVIRAJA PANDIAN

and

The Honourable Mrs.Justice CHITRA VENKATARAMAN

Tax Case (Appeal) Nos.439 and 440 of 2004

The Commissioner of Income Tax-I
Chennai. .. Appellant in both the appeals

Vs

M/s.Gobi Textiles Limited
Chennai. .. Respondent in both the appeals.

TAX CASE (APPEAL) under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 30.04.2003 made in I.T.A.Nos.1638/Mds/2000 and 1176/Mds/02 for the assessment years 1996-97 against the order of the commissioner in Income Tax (Appeals) XI, Chennai in ITA No.480/2001-2002 dated 7.6.2002 against the order of the Joint Commissioner of Income Tax Special Range XI,chennai in GIR No.10-G dated 12.3.99.

For Appellant : Mr.J.Narayanaswami
Jr.Standing Cousnel for Income-tax
For Respondent : Mr.V.S.Jayakumar

JUDGMENT

JUDGMENT OF THE COURT WAS DELIVERED BY K.RAVIRAJA PANDIAN,J

The relevant assessment year is 1996-97. The appeal is filed formulating the following substantial questions of law:-

1. Whether on the facts and circumstances of the case, the burden cast on the assessee by explanation 1B to Section 271(1)(c) stands discharged by the assessee providing basic information without substantiating the same?

2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the onus of proving the source for the share application money is not entirely on the assessee, but largely on the assessing officer?

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3. Whether in the facts and circumstances of the case, the assessing officer has to prove that the cash credit is unexplained or that the explanation given is not true, to make an addition under Section 68 of the Income Tax Act?

2. The necessary facts as culled out from the statement of facts are as follows:-

For the assessment year 1996-97, the assessee Company filed its return of income on 29.11.1996 declaring a total loss of Rs.72,21,172/-. The assessment was completed under Section 143(3) of the Income Tax Act on 12.9.1999 determining the net loss of Rs.21,56,526/- after considering the unexplained cash credit of Rs.56,47,470/-.

3. While processing the assessment, the assessing officer found a sum of Rs.72.90 lakhs was received in the financial year 1996-97 as share application money thereby the assessee company's share capital was increased to Rs.1,67,88,000/-. Out of Rs.72.90 lakhs received, a sum of Rs.53,88,100/- was claimed to have been received from persons who were not Income-tax assessees. Hence the assesseee was required to prove the genuineness of the transactions by producing persons who have deposited more than Rs.1 lakh. The assessee company produced salary certificates of 10 persons and land holding papers of certain properties but not produced any persons. On consideration of the particulars furnished by the assessee, the assessing officer was of the view that except one person others were not capable of depositing money in cash out of their savings. On that view, the assessing officer treated the share application money of Rs.53,88,100/- as unexplained cash credit under Section 68 of the Income-Tax Act and added the same in the income of the assessee. On appeal, the Commissioner of Income Tax (Appeals) upheld the order of the assessing officer.

4. While so, in a separate proceedings, the Joint Commissioner of Income Tax initiated penalty proceeding under Section 271(1)(c) for concealment of income and levied penalty, which was also confirmed by the Commissioner of Income-Tax (Appeals) on appeal. As against the orders of Commissioner of Income-tax (Appeals) confirming the assessment order as well as imposition of penalty, two appeals were filed before the Income-tax Appellate Tribunal. The Tribunal on the basis of the materials on record held that the assessee had discharged the onus cast upon it by providing the basic information, and the assessing officer failed to disprove the claim of the assessee as not genuine. By so holding, the Tribunal allowed both the appeals. The correctness of the said order is now put in issue before this Court.

5. We heard the argument of the learned counsel on either side and perused the materials on record.

6. The ultimate fact finding authority – the Tribunal in its order, which is impugned in these appeals, has recorded a clear finding to the effect that in the instant case, the assessing officer had listed the share holders and found some of them were retired employees of the bank,

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some of them were working employees of the bank and rest of them were agriculturists. The assessing officer did not dispute that those persons did not exist. Though the assessing officer directed the assessee company to produce the persons, he did not take the minimum pain of issuing notice to any one of the persons when the details about them were very much available with him. Thus the assessing officer failed in his duty and obligation to disprove the claim of the assessee to the effect that the depositors were not genuine persons. The Tribunal further recorded a finding that the action of the assessing officer in arriving at a conclusion that the persons with low salary income would not have mobilised the fund was based on wild guess and doubting the capacity of the persons on surmises. It further held that the assessing officer failed to prove that the share holders were not possessing money to pay the share application money. According to the Tribunal, the assessee discharged the onus cast upon it by providing the basic materials and it was the assessing officer who failed to prove the contrary.

7. Learned counsel appearing for the revenue relied on a latest decision of the Supreme Court in the case of COMMISSIONER OF INCOME-TAX VS. P.MOHANAKALA reported in (2007) 291 ITR 278. We have gone through the said judgment, wherein the Supreme Court after referring to Section 68 of the Income Tax Act has held as follows:

> "The question is what is the true nature and scope of section 68 of the Act? When and in what circumstances would section 68 of the Act come into play? A bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessees offer no explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory, it is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion."

8. If the above observation of the Supreme Court is applied to the facts of the present case, the decision straightly staring at the revenue because the explanation offered by the assessee cannot by any stretch of imagination be considered as unreasonable or not acceptable explanation as regards the sum credited in the books maintained by the

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assessee. Further, the opinion of the assessing officer which was required to be formed objectively with reference to the material available on record was also not formed nor viewed as directed by the Supreme Court in the above said decision. Above all, the issue is one of factual in nature and the question of law, which is the basic requirement for filing an appeal under Section 260-A of the Income-tax Act is not available.

9. The Division Bench of this Court in the case of COMMISSIONER OF INCOME-TAX, CHENNAI VS. M/S.ELECTRO POLYCHEM LIMITED made in T.C.(A) Nos.782 and 783 of 2007 dated 21.6.2007 had an occasion to consider the issue similar to the issue in the case on hand and rejected the case of the Revenue. The relevant portion of the order reads as follows:

> "3. In Commissioner of Income Tax v. Stellar Investment Ltd. (192 ITR 287), where the increase in subscribed capital of the respondent-Company, accepted by the Income Tax Officer and rejected by the Commissioner on the ground that a detailed investigation was required regarding the genuineness of subscribers to share capital, as there was a device of converting black money by issuing shares, with the help of formation of an investment, which was reversed by the Tribunal, the Delhi High Court held that even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company.
>
> 4. The view taken by the Delhi High Court in Commissioner of Income Tax v. Stellar Investment Ltd. (192 ITR 287) cited supra, was confirmed by the Apex Court and the same was reported in 251 ITR 263."

10. In the case of COMMISSIONER OF INCOME TAX VS. SOPHIA FINANCE LIMITED reported in 205 ITR 908, the Delhi Court has observed that an enquiry by the assessing officer as to the existence or non-existence of the shareholder and about their creditworthiness is condition president for treating the cash credit as the income of the company. No such enquiry was conducted by the assessing officer in this case.

11. For the fore-going reasons, and in the light of the law laid down by Court referred to supra, the quantum appeal is dismissed. Consequently, the appeal against the order of setting aside the imposition of penalty is also dismissed.

sd/-
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Assistant Registrar,
   Income Tax Appellate Tribunal,
   III floor,Rajaji Bhavan, Besant Nagar,
   Chennai-600 034

2. The Commissioner of
   Income-tax (Appeals)- XI
   Chennai

3.The Joint
  Commissioner of
    Income Tax, Special Range-XI
    Chennai.

4. The Commissioner Income Tax-I,
   Chennai.

+ 1 cc to Mrs.Pushya Sitaraman Advocate SR.NO.55617
+ 1 cc to Mr.V.S.Jayakumar Advocate SR.NO.55714

GG(CO)
R 17.9.07

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